STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN P. HILL,

Defendant-Appellant.

UNPUBLISHED
May 22, 2003

No. 233208
Wayne Circuit Court
LC No. 00-001416

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and two counts of assault with intent to rob while armed, MCL 750.89. He was acquitted of an additional charge of assault with intent to commit murder, MCL 750.83. He was sentenced as a second-felony habitual offender, MCL 769.10(1)(a), to concurrent terms of sixteen to twenty-five years' imprisonment for each of his convictions. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion to quash the information and in allowing the prosecutor to amend the information to add a second charge of assault with intent to rob while armed. We disagree. This Court reviews a circuit court's decision to grant or deny a motion to quash a felony information de novo to determine if the district court abused its discretion in ordering the bindover. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998).

Apart from establishing probable cause that defendant committed an assault with intent to rob while armed, the evidence at the preliminary examination also established probable cause to bind defendant over on the charges of armed robbery and assault with intent to commit murder.[1] *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998); see also *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995), overruled in part on other grounds in *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001). The trial court properly denied defendant's motion to quash. Additionally, defendant was on notice that the prosecution intended to charge a second count of assault with intent to rob while armed, and the evidence presented at defendant's

[1] Defendant did not move to quash the original assault with intent to rob while armed count.

preliminary examination supported two separate counts. Thus, the trial court did not err in allowing the prosecutor to amend the information to add a second count. *Goecke*, *supra* at 459-460, 462.

Defendant next argues that the trial court erred in excluding his statement to the police. Defendant asserts that it was admissible as a statement against his penal interests under MRE 804(b)(3). We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). In considering the admissibility of a statement under MRE 804(b)(3), a reviewing court must determine whether the declarant was unavailable, whether the statement was against his penal interest and whether a reasonable person in his position would have believed that the statement was true. See *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996).

The first requirement for introducing a statement against penal interest is that the declarant be unavailable. See MRE 804(a) and (b). Although the parties do not specifically discuss the "unavailability" requirement, we find it to be dispositive. Defendant's alleged unavailability is predicated on his assertion of his Fifth Amendment right not to testify at trial. We conclude that defendant's assertion of this privilege did not render him unavailable for purposes of allowing him to introduce his own former statement under MRE 804(b)(3).

MRE 804(a) provides, in pertinent part:

> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing a witness from testifying.

Here, defendant was the proponent of his own statement and purposefully procured his own absence by electing not to testify.

A similar situation was addressed in *United States v Cucci*, unpublished opinion of the Fourth Circuit Court of Appeals, issued September 3, 1993 (Docket Nos. 92-5533 and 92-5534); 1993 US App Lexis 22538, wherein the court stated:

> Covello argues alternatively that these statements fit within an exception to the hearsay rule—that found in [FRE] 804(b)(3), allowing admission of statements against pecuniary interest when the declarant is *unavailable*. He contends that he was *unavailable* for the purposes of Rule 804 because he properly invoked the protection of the Fifth Amendment. See *United States v MacCloskey*, 682 F2d 468, 477 (CA 4, 1982). We also reject this argument.
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> Rule 804 was not intended to allow a *defendant* to have the advantages of having his statements introduced at trial without the disadvantages of cross-examination and impeachment. See *United States v Bennett*, 539 F2d 45, 54 (CA 10, 1976), cert den 429 US 925 (1976). Nor does the text of Rule 804

> contemplate allowing a *defendant* invoking the Fifth Amendment to admit his *own statements* under a hearsay exception. In defining unavailability, Rule 804(a) provides that "[a] declarant is not *unavailable* as a witness if [his unavailability] is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying." While Covello obviously has engaged in no wrongdoing in declining to testify, he has procured the declarant's absence in the sense that whether or not he testifies is within his own control. If he wishes to give his own testimony, he must be prepared to submit to cross-examination. If he elects not to testify and asserts his Fifth Amendment privilege, he bears the consequences of not having his testimony before the jury. He cannot have it both ways. [Emphasis in the original.]

See also *Bennett*, *supra* at 54 (where the defendant elected not to testify at his second trial, he was not "unavailable" such that he could introduce his former testimony from his first trial). Because MRE 804(b)(3) is modeled after FRE 804(b)(3), this Court can look to federal precedent for guidance. *Barrera*, *supra* at 267-268. Further, while the decision in *Cucci* is unpublished, we find its reasoning persuasive. We therefore conclude that defendant was not "unavailable" and, accordingly, his statement was not admissible under MRE 804(b)(3).

Next, defendant argues that his attorney was ineffective for failing to move for either full or partial severance of his trial from codefendant O'Bannon's trial. We disagree. Where, as here, a defendant does not raise the issue of ineffective assistance of counsel in a motion for a new trial or *Ginther*[2] hearing, our review of the issue is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he has been prejudiced by the error in question. *Id.* at 312, 314.

Severance is mandated under MCR 6.121(C) only when a defendant clearly and affirmatively demonstrates through an affidavit or offer of proof that his substantial rights will be prejudiced by a joint trial and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 331, 346; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994). "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.' " *Id.* at 349. " 'Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice' " to require severance. *Hana*, *supra* at 349, quoting *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993). Rather, "[t]he tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." *Hana*, *supra* at 349, quoting *Yefsky*, *supra* at 897.

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

In this case, defendant's theory at trial was that codefendant O'Bannon was the perpetrator of the charged crimes and that he (defendant) was merely present and did not voluntarily do anything to assist in the commission of the crimes. In contrast, codefendant O'Bannon pursued a defense of mistaken identity. To the extent a basis for severance could legitimately have been argued, defendant has not overcome the presumption that counsel's decision not to request severance was a matter of trial strategy. The evidence at trial pointed to codefendant O'Bannon as the principal perpetrator, and tended to depict defendant's role as secondary or peripheral. Counsel reasonably may have believed that a joint trial would highlight codefendant O'Bannon's involvement and minimize defendant's involvement, thereby lending support to defendant's mere presence defense. Indeed, this strategy appears to have been partially successful, because defendant was acquitted of the most serious offense of assault with intent to commit murder. Further, as discussed below, codefendant O'Bannon's statements to his girlfriend would have been admissible against defendant, even had he been tried separately. Because defendant has failed to overcome the presumption of sound trial strategy, his ineffective assistance of counsel claim must fail.

Defendant next argues that codefendant O'Bannon's statement to his girlfriend was hearsay and inadmissible as to him and, therefore, counsel was ineffective in failing to object to this evidence at trial. We disagree.

Contrary to what defendant argues, there is no violation of the constitutional right of confrontation where an out-of-court statement, admissible under the rules of evidence, is used to inculpate a non-declarant defendant and bears adequate indicia of reliability. *People v Poole*, 444 Mich 151, 162-164; 506 NW2d 505 (1993); see also *People v Schutte*, 240 Mich App 713, 717-718; 613 NW2d 370 (2000). In this case, the record reveals that codefendant O'Bannon's statement was admissible under MRE 804(b)(3) and was sufficiently reliable to render it admissible against defendant.

To determine whether adequate indicia of reliability are present, courts examine the statement in light of the factors identified in *Poole*, *supra* at 164-165; see also *Schutte*, *supra* at 718-719. At trial, codefendant O'Bannon's former girlfriend testified that, on the night of the crime, codefendant O'Bannon began to cry and told her that he and defendant had tried to rob a motel and had shot someone. This statement was clearly against codefendant O'Bannon's penal interest, MRE 804(b)(3), because it tended to implicate him in the crime. Although codefendant O'Bannon initially accused defendant of being the shooter, he later admitted having done the shooting himself. No reasonable person in his position would have made such a statement unless they believed it was true. Codefendant O'Bannon never denied making the statement. Further, the statement was made voluntarily and spontaneously, on the night of the incident, and to someone to whom codefendant O'Bannon would likely speak the truth. Further, while codefendant O'Bannon had a motive to lie and distort the truth, he ultimately admitted his primary involvement in the offense, retracting his initial attempt to shift the blame to defendant. There is no suggestion that he was attempting to curry favor by admitting to this crime. In sum, the circumstances demonstrate that codefendant O'Bannon's out-of-court statement had particularized guarantees of trustworthiness and, therefore, could be used to inculpate defendant without violating his right of confrontation. *Poole*, *supra* at 162-164. Because the statement was admissible against defendant, we conclude that defendant's attorney was not ineffective for

failing to object to its admission. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant next argues that the evidence was insufficient to support his convictions. We disagree. The sufficiency of the evidence is to be evaluated by reviewing the evidence in the light most favorable to the prosecution. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The test is whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *Id.*

At trial, evidence was presented that defendants jointly purchased bullets for codefendant O'Bannon's gun before the crime, that they arrived together at the motel, and that they both entered the motel office. Codefendant O'Bannon announced a robbery and produced a gun. He pointed the gun at the two women in the office and threatened to shoot them. Defendant, with knowledge of codefendant O'Bannon's intent, attempted to open the safe. Viewed in a light most favorable to the prosecutor, the evidence was sufficient to enable a reasonable jury to find, beyond a reasonable doubt, that defendant and codefendant O'Bannon were acting together as part of a common plan to rob the motel and that defendant assisted codefendant O'Bannon by accompanying him into the motel office and attempting to open the safe. See *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993); *Turner*, *supra* at 569.

Further, after the two defendants were unsuccessful in their efforts to rob the motel, codefendant O'Bannon approached the motel maintenance man in the parking lot, struck him, and asked if he had any money. Codefendant O'Bannon then shot him in the back. A witness saw one of the two defendants standing over the maintenance man, going through his pockets, before shooting him again in the face, and the maintenance man later reported money missing from his shirt pocket. Witnesses saw one or both of the defendants doing something in the rear of the car, perhaps putting something in the trunk or covering the license plate, and both defendants fled together. Following a police chase, both defendants fled from the car. The police found defendant hiding nearby. Later that night, codefendant O'Bannon confessed the crime to his girlfriend. Viewed in a light most favorable to the prosecution, we believe the evidence was sufficient to establish defendant's complicity in the armed robbery of the maintenance man, beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *Turner*, *supra* at 569.

Lastly, defendant argues, in pro per, that the trial court erred in denying his request for an instruction on attempted larceny in a building, as a lesser offense to assault with intent to rob while armed. We disagree. Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

In *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002), our Supreme Court held that MCL 768.32(1) does not permit instruction on lesser cognate offenses. Further, the Court stated that its decision was "to be given limited retroactive effect, applying to those cases pending on appeal in which the issue has been raised and preserved." *Id.* at 367.

This case was pending on appeal when *Cornell* was decided and the issue was preserved below by a request for an instruction on attempted larceny in a building. It is apparent that attempted larceny in a building is only a lesser cognate offense of assault with intent to rob while

armed, not a necessarily included lesser offense, because the requirement that a crime take place in a building is not an element of the crime of assault with intent to rob while armed. Cf. *People v Beach*, 429 Mich 450, 453, 484; 418 NW2d 861 (1988), and *People v Jackson*, 71 Mich App 395, 402; 249 NW2d 132 (1976). Thus, because an instruction on attempted larceny in a building would have been improper, there was no error.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer

I concur in the result only.

/s/ William B. Murphy